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CITATIONS

393-040—70——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 108

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

PEDRO PERALES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The original opinion of the court of appeals (App. 36) is reported at 412 F. 2d 44. The opinion of the court of appeals denying rehearing (App. 54) is reported at 416 F. 2d 1250. The opinion of the district court (App. 33) is reported at 288 F. Supp. 313.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1969 (App. 57). A timely petition for rehearing and suggestion of rehearing en banc was denied by the court of appeals on October 10, 1969. On December 30, 1969, Mr. Justice Marshall extended the

time for filing a petition for a writ of certiorari to and including March 9, 1970. The petition for certorari was filed on the latter date, and was granted on April 20, 1970 (App. 58). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether written reports by physicians of medical examinations they have conducted may constitute substantial evidence to support a finding of non-disability under the Social Security Act, even though oral medical testimony is contrary to the reports and the claimant has objected to the introduction into evidence of the written reports.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Social Security Act, as amended, 42 U.S.C. 401 *et seq.*, and of Title 20 of the Code of Federal Regulations, as amended, are set forth in Appendix A, *infra*, pp. 43–44.

STATEMENT

1. In April 1966, the respondent, Pedro Perales, applied for disability insurance benefits under the Social Security Act, alleging that he became disabled on September 29, 1965, at the age of 33, as the result of a back injury (Tr. 178–181).[1] Perales had been treated for this injury by a neurosurgeon, Dr. Munslow. After conservative treatment proved unavail-

[1] "Tr." references are to those pages of the transcript of the administrative proceedings that are not reproduced in the Appendix.

ing (see App. 208–209), Dr. Munslow performed remedial surgery upon him in November 1965 (App. 165). Perales continued to complain, and he returned to the hospital in January 1966 (App. 161–163, 207). Dr. Munslow's diagnosis upon Perales' discharge at that time was mild lumbar neuritis (App. 161). Thereafter, Dr. Munslow and a neurologist, Dr. Lampert, were unable to find any neurological explanation for Perales' continued complaints (see App. 196–202, 205–206), and, in April 1966, Perales put himself in the care of a general practitioner, Dr. Morales (see App. 167). Perales was hospitalized for the last two weeks in April 1966, and, upon his discharge on May 2, Dr. Morales recorded his diagnosis as lumbo-sacral back sprain (App. 171).

As required by the Act (42 U.S.C. 421), Perales' claim for disability benefits was referred to a State agency for determination. As is customary, the State agency obtained the claimant's hospital records, as well as a current report from the claimant's treating physician, Dr. Morales (App. 167–170). Dr. Morales reported no physical findings or results of laboratory or other studies (see App. 168–170), but gave as his diagnosis a moderately severe lumbo-sacral back sprain and indicated he would not rule out a ruptured disk (App. 167, 170).

In addition, as is also customary, the State agency arranged for a medical examination of the claimant, at no cost to him, by a consultant physician selected from a list of those who had agreed to make such examinations and to report their findings. This examination was performed by an orthopedic surgeon, Dr.

Langston (see Tr. 229), who submitted a detailed report (App. 175–177). In brief, the report stated that, while some of Perales' spinal muscles were "slightly tender" (due, in the doctor's view, to "a very mild sprain" and poor posture), neurological examination was entirely normal, no atrophy was present, and X-rays revealed no significant abnormalities. Dr. Langston emphasized that Perales was "obviously holding back and limiting all of his motions, intentionally" (App. 175; see also App. 176). Dr. Langston concluded from what he viewed as Perales' "obvious attempt * * * to exaggerate his difficulties by simply just standing there and not moving * * * even the uninvolved upper extremities" that he had "a tremendous psychological overlay to this illness," and suggested a psychiatric examination (App. 177).

The State agency denied Perales' claim on June 16, 1966 (App. 155). Perales requested reconsideration (Ex. 6, Tr. 190), and apparently submitted additional reports from Dr. Morales in support of that request (App. 178–185).[2] The State agency arranged for an additional consultative examination by Dr. Bailey, a board-certified psychiatrist with a subspecialty in neurology (see Tr. 228). Dr. Bailey submitted a report reflecting what Perales told him during the interview and expressing a diagnosis of "paranoid personality, manifested by hostility, feelings of persecution and

[2] In his report of August 17, 1966 (App. 181–185), Dr. Morales stated that, based on Perales' continued complaints, he was convinced Perales was not malingering, and that it was his opinion that the injury Perales had suffered had not been corrected by surgery and was permanent (App. 184–185).

long history of strained interpersonal relationships" (App. 186–187).

All the medical evidence was then reviewed for the State agency by a physician and by a disability examiner (see App. 158; items 34–36, Ex. 9, Tr. 196). The Social Security Administration's Bureau of Disability Insurance then reviewed the matter independently (App. 158); that process included an analysis of the evidence (App. 189–190) by Dr. Moses, a board-certified specialist in neurology research at Johns Hopkins Hospital (see Tr. 230). On October 20, 1966, Perales was notified that the initial denial of his claim would stand (App. 158–160).

2. On November 15, 1966, Perales requested a hearing before a federal hearing examiner (Tr. 31) (see 42 U.S.C. 405(b), 421(d)). Prior to the hearing, he was referred by the State agency and Dr. Langston to a Dr. Mattson for an electromyographic study.

Dr. Mattson submitted his notes of that study (Ex. 18, Tr. 226–227) and a report thereof (App. 193–194) to Dr. Langston. That report reflected some "chronic or past disturbance of function" in the nerve supply to certain of Perales' muscles but "no evidence" to indicate "any active process effecting [sic] the nerves at present;" the report also indicated that the test revealed that the firing of the motor units in all of the muscles tested was "strongly suggestive of lack of maximal effort" which is "typically associated with" and "strongly suggestive of" a "functional or psychogenic component" to the muscle weakness. After receiving the report, Dr. Langston reported to the State agency that the finding of "very poor effort"

in Dr. Mattson's notes (Tr. 226) was exactly what he had found in his prior examination of Perales (App. 191).

The notice setting the requested hearing (App. 59-63) advised Perales, *inter alia,* that he could be represented by a lawyer or other qualified person if he so desired; that he should bring all medical evidence not already presented; that he could bring his own physician or other witnesses to testify; and that he could examine the documentary evidence in the case, either on the day of the hearing or at the hearing examiner's office prior thereto (App. 61–63).

Although the Act gives the Secretary subpoena power (42 U.S.C. 405(d)), and the Secretary's regulations provide that a claimant may request subpoenas for the attendance of witnesses and establish the conditions upon which such subpoenas may issue (20 C.F.R. 404.926), the claimant, who was represented by counsel, did not request any subpoenas for either the original hearing or the supplemental hearing which was later held. But, at the two hearings, claimant's counsel objected to the introduction of the written reports of the consultants, Drs. Langston (App. 175–177, 191), Bailey (App. 186–187) and Mattson (Ex. 18, Tr. 226–227),[3] and to the reports of the claimants' former treating physicians,

[3] Although no specific objection was taken (App. 82–83) to the introduction of the report of Dr. Mattson (Ex. 20, App. 193–194), that report, as already noted, merely summarized the findings in his notes, to which objection was taken.

Drs. Munslow (App. 196–199)[4] and Lampert (App. 200–202), on the grounds that the reports were hearsay and that their authors would not be present for cross-examination (App. 66–69, 126–127, 129).[5] The objections were overruled, and all of those reports, as well as the claimant's hospital records and the reports of his treating physician, Dr. Morales (App. 161–174, 178–179, 181–185, 195), and the reports of Dr. Munslow that were produced by claimant's counsel (see n. 4, *supra*), were admitted into evidence (App. 69, 111, 127, 129, 134).

Oral testimony was presented at the two hearings by the claimant (App. 90–100, 112–117, 123–129) and by Dr. Morales (App. 72–90, 100–111), as well as by a former fellow employee of the claimant (Tr. 110–126), by a vocational expert (Tr. 161–173), and by an expert medical witness, Dr. Leavitt (App. 129–150). Dr. Leavitt was called by the hearing examiner

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[4] None of Dr. Munslow's reports, except those contained in the hospital records, was admitted until the supplemental hearing. By that time, the hearing examiner had obtained a file (Ex. 25, Tr. 239–250) furnished by the Texas Industrial Accident Board (before which Perales' workmen's compensation claim was then pending), which contained Dr. Munslow's reports of March 9, May 10 and May 19, 1966 (App. 196–199). After the claimant's objections to the admission of that file were overruled (App. 127), his counsel produced Dr. Munslow's reports of November 12 and 22, 1965, and January 3 and February 1, 1966 (App. 205–209), which were admitted into evidence (App. 134).

[5] The claimant also objected to the introduction of the documents (Ex. 3, Tr. 183–186; Ex. 7, Tr. 191–193; Ex. 8, App. 158–160; Ex. 9, Tr. 196–197; Ex. 17, App. 189–190), which the hearing examiner stated were only for background purposes (App. 67), that reflected the course of the prior administrative evaluation and denial of Perales' claim.

(and was subjected to interrogation by claimant's counsel) as a "medical advisor," *i.e.*, a physician who does not examine the claimant but who, as an expert witness, explains the significance of the medical evidence in the case and sometimes, as in this case, offers an opinion on the claimant's condition based on that evidence (see App. 117, 131 and discussion, *infra*, pp. 36–42).*

The hearing examiner held, in reliance upon the written medical reports and Dr. Leavitt's testimony, that the heavy preponderance of the evidence was that Perales' impairment was of mild severity and that he was not disabled within the meaning of the Social Security Act (App. 210–225). Upon review by the Appeals Council, the claimant was permitted to introduce (see App. 237) additional evidence which included the written report of Dr. Williams (App. 227–228), an orthopedic surgeon who had examined the claimant, apparently in connection with a claim

* The hearing examiner explained to claimant's counsel that, rather than select the medical advisor himself, he would have his hearing assistant make the choice from a list maintained by the Department of Health, Education, and Welfare and that counsel would have the opportunity to question the qualifications and possible bias of the medical advisor (App. 117–119). At the hearing, Dr. Leavitt stated that he was board-certified in physical medicine and rehabilitation, that he was the Chairman of, and a Professor in, the Department of Physical Medicine at Baylor University College of Medicine, that he was Chief of Service at several affiliated hospitals, and a consultant to the Veterans Administration (App. 130). He also stated that he had not discussed the case with the hearing examiner and that, although the government paid his fee, he was completely independent with no loyalty to anyone (App. 130–131).

for welfare benefits, prior to the administrative hearings. The Appeals Council upheld the decision of the hearing examiner (App. 238–239).

3. The claimant then brought this action in the district court under 42 U.S.C. 405(g), seeking review of that decision, which constituted the Secretary's final determination on his claim. Both parties moved for summary judgment on the basis of the administrative transcript, the Secretary asserting, and the claimant contesting, that the administrative decision was supported by substantial evidence (App. 7–9; see 42 U.S.C. 405(g), *infra*, p. 43). The district court reversed the Secretary's decision and ordered a full new administrative hearing (App. 32), on the ground that, except in unusual circumstances, written medical reports "should [not] be received and considered, over objection," because their admission "would have the effect of denying to the opposition an opportunity for cross-examination" (App. 30, 31).

On appeal, the court of appeals held that the Social Security Act and the regulations thereunder permitted the admission into evidence of written medical reports at administrative hearings (App. 40–45). It further held that the claimant could not complain of the "denial" of the right to cross-examine the authors of the reports, since he had not sought to subpoena them (App. 43–44). The court ruled, however, that because written medical reports are "uncorroborated hearsay," they cannot be regarded as substantial evidence upon which the Secretary may base a determination of nondisability (App. 46–53). The court of appeals also held that the testimony of the medical ad-

visor, who testified orally at the hearing, was "hearsay on hearsay" and could not "corroborate the hearsay reports of the absent doctors" (App. 49). And the court generally criticized the practice of using medical advisors in the administrative hearings (App. 51-52).

In an opinion denying rehearing, the panel stated that its ruling—that "uncorroborated hearsay" could not constitute substantial evidence—was applicable only if the claimant had objected to the hearsay and the hearsay was "directly contradicted" by the claimant and by oral medical testimony (App. 55).

SUMMARY OF ARGUMENT

In creating the Social Security benefits program, Congress authorized the Secretary to establish the procedures by which hearings on claims would be governed, 42 U.S.C. 405(a) (App., *infra*, p. 43). While providing that claimants are entitled to hearings, Congress left to the Secretary the determination of the detailed nature of those hearings and stressed that the hearings were to be informal by explicitly providing that "[e]vidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure." 42 U.S.C. 405(b) (App., *infra*, p. 43).

Acting under this mandate, the Secretary has established a flexible procedure for the resolution of disability claims. He has left the "procedure at the hearing generally" to "the discretion of the hearing examiner," but has directed that the procedure be of "such nature as to afford the parties a reasonable opportunity for a fair hearing." 20 C.F.R. 404.927

(App., *infra*, p. 44). To that end, as previously noted, a hearing examiner may, at the request of a claimant, issue subpoenas for oral testimony upon a proper showing of need. 20 C.F.R. 404.926 (App., *infra* pp. 43–44).

The hearing examiners customarily receive into evidence medical reports written either by a claimant's treating physicians or by independent consultant physicians who have examined the claimant. And, for many years, hearing examiners and the Secretary have placed substantial reliance upon those written reports and have accepted the reliable expert judgments expressed in the reports even though the experts themselves did not testify at the hearing.

Judicial review of those of the Secretary's determinations which are adverse to claimants is governed by the "substantial evidence" standard. 42 U.S.C. 405(g) (App., *infra*, p. 43). This Court has repeatedly defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," or, in other words, "evidence having rational probative force." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229, 230; *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 477; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620. Under these decisions, technical rules of evidence, such as the hearsay rule, are not determinative, since the probative value and reliability of both hearsay and non-hearsay evidence varies widely.

The inherent reliability and probative value of written medical reports brings them squarely within the standards of substantiality articulated by this Court. The reports are prepared by independent consultants who have no motive to be anything but impartial. Their reports are of great probative value, for they furnish the results of scientific tests performed as well as the expert opinion of these highly competent physicians. Indeed, such reports are commonly relied upon by doctors in performing their professional work. The failure of the claimant to request subpoenas for the attendance of the authors of the reports, or to suggest specifically why they should have been called to testify to explain their reports, only adds to the persuasiveness of the reports in this case.

There has been, in another context, explicit judicial recognition of the reliability and probative value of written medical reports (*Long* v. *United States,* 59 F. 2d 602 (C.A. 4)). In Social Security disability cases, implicit recognition of the intrinsic value of such reports is found in the courts' traditional acceptance of the Secretary's reliance on them.

The court below departed from the established criteria and instead announced the novel rule that, without regard to the reliability and probative value of the particular reports involved, written medical reports—which the court characterized as "uncorroborated hearsay"—cannot constitute "substantial evidence" of non-disability in any case in which they are objected to and contradicted by any live medical testimony at the hearing. In so ruling, the court relied on the statement in *Consolidated Edison, supra,* that "[m]ere

uncorroborated hearsay or rumor does not constitute substantial evidence." 305 U.S. at 230. But that statement was made in dealing with extremely unreliable hearsay. To apply it in the different context of the reliable reports here involved would be inconsistent with the remainder of the *Consolidated Edison* opinion, which emphasized the probative force, rather than the technical characterization, of the evidence. Accordingly, other courts of appeals and leading commentators have concluded, in contrast to the court below, that this Court's opinions do not, and should not, require reviewing courts to set aside administrative findings merely because they are not supported by at least a "residuum" of legally admissible evidence.

Regardless of whether this so-called "residuum rule" has any rightful place in judicial review of administrative proceedings generally, its application by the court below to the resolution of disability claims is particularly inappropriate, in light of the statutory authorization of hearsay evidence in these proceedings and the widely recognized value of the type of written evidence at issue. Moreover, the rule adopted by the court of appeals would result in a serious, unnecessary drain on the productive time (already in critically short supply) of practicing physicians and would threaten to disrupt the entire process of administering the disability insurance program by discouraging physicians from conducting the consultant examinations. Since consultant reports often furnish the basis for the allowance of claims prior to hearing, this prospect is of concern to claimants as well as to the Secretary.

For these reasons, this Court should hold that written medical reports, even though objected to and contradicted by oral medical testimony, can constitute substantial evidence sufficient to support the Secretary's determination—if their content warrants it. If the Court so holds, the medical reports also support the oral expert testimony of the medical advisor, who does not examine the claimant but bases his opinion on the medical evidence in the case. His role as an expert witness properly contributes to the accuracy of the administrative determination in disability hearings.

ARGUMENT

I

CONGRESS HAS AUTHORIZED THE PROCEDURES FOLLOWED IN THIS CASE, AND THAT AUTHORIZATION IS VALID

In setting up the Social Security System, Congress legislated with great care. The system must deal with more than one hundred million individuals, and with millions of determinations and adjudications. Such a system must be fair—and it must work.

In order to bring this about, Congress authorized the Secretary "to make rules and regulations and to establish procedures," and further provided that he

> shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder. [42 U.S.C. § 405(a).]

In addition to giving the Secretary this broad power, Congress explicitly provided that—

> * * * Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure. [42 U.S.C. 405(b).]

Finally, Congress provided that—

> * * * The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive * * *. [42 U.S.C. 405(g).]

In carrying out these statutory provisions, the Secretary has adopted regulations (App., *infra*, pp. 43–44) which provide for the issuance of subpoenas, and further provide that—

> the procedure at the hearing generally * * * shall be in the discretion of the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing. [20 C.F.R. 404.927.]

By its express action, Congress has provided the rule applicable in this case, namely, that the rules of evidence ordinarily applicable in court proceedings need not be followed in these hearings. The decision of the court below goes far to undermine the procedures established and authorized by Congress, and is, in essence, inconsistent with the careful and specific provisions which Congress has enacted.

There can be no doubt of the validity of the statutory provisions, and specifically of 42 U.S.C. 405(b), which permits the use of evidence "even though inadmissible under rules of evidence applicable to court procedure," and of 42 U.S.C. 405(g), under which "The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive * * *."

The only basis on which these statutory provisions could be attacked would be that they operate, in some way, to deny "due process of law," contrary to the Fifth Amendment. It is plain, though, that Congress has taken care that the procedures followed shall be fundamentally fair, and the Secretary has expressly carried this out by providing in the regulations that "the procedure at the hearing generally * * * shall be * * * of such nature as to afford the parties a reasonable opportunity for a fair hearing" (20 C.F.R. 404.927).

The hearsay rule has its uses, but it is by no means the only instrument that can rationally be used in the process of seeking out the truth. Certainly, Congress can constitutionally provide for the use of hearsay—particularly of the sort involved here—in administrative proceedings (see discussion in Point II, *infra*). No question of the Confrontation Clause arises in this civil case (in which the claimant did not attempt to utilize the administrative provision for subpoena of witnesses). There would thus appear to be no basis upon which the express authorization of Congress allowing the use of hearsay evidence can be held in any way invalid. Cf. *California* v. *Green,* No. 387, O.T., 1969, decided June 23, 1970. This is particularly true in a case like this where the type of evidence involved has inherent probative value, as will be developed in the following sections of this brief.

II

WRITTEN MEDICAL REPORTS FURNISH RELIABLE AND PROBATIVE EVIDENCE OF A CLAIMANT'S CONDITION AND THEREFORE CAN CONSTITUTE SUBSTANTIAL EVIDENCE, EVEN THOUGH OBJECTED TO AND CONTRADICTED BY ORAL MEDICAL TESTIMONY

A. WRITTEN MEDICAL REPORTS FURNISH RELIABLE AND PROBATIVE EVIDENCE OF A CLAIMANT'S CONDITION

The Social Security Act provides that the Secretary's findings shall be conclusive "if supported by substantial evidence" (42 U.S.C. 405(g), *infra*, p. 43). This Court has repeatedly held that "substantial evidence" sufficient to support an administrative determination is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," or, in other words, "evidence having rational probative force." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229, 230; *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 477; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620.

The basic error of the court of appeals was its failure to apply these standards in determining whether written medical reports, upon which administrative determinations of disability claims are usually based, can constitute substantial evidence which may, even if contested, be sufficient to support the determination. These reports have inherent reliability and are of obvious probative value in ascertaining a claimant's condition. They are customarily prepared by highly

qualified physicians who have either treated the claimant or examined him as a consultant.

The consultants who examine claimants and prepare reports at the request of the State agency are independently qualified physicians who have no interest in the outcome of the proceeding. Their receipt of a fee from the government for conducting the examination cannot properly be viewed as introducing into their reports any bias against claimants. For the consultants have every reason to realize that the government's role in disability claims (unlike that of a private person who, in defending against a claim for damages or compensation benefits, stands to be affected adversely by a judgment in favor of the claimant) is not that of an adversary, but that of an adjudicator. Its interest in insuring that benefits are paid promptly to those who are entitled to them is as great as its interest in protecting the disability trust fund against non-meritorious claims.[7]

The consultant physicians' reports are, therefore, expected to contain impartial and independent evaluations. Indeed, such reports often furnish the basis for the allowance of claims, both prior to and at the hearing stage (see n. 7, *supra*).[8] There is no inducement

[7] In fiscal 1968, for example, 343,628, or almost two-thirds, of the 515,938 disability claims processed were allowed prior to the hearing stage of the administrative process; in addition, approximately 6,900, or almost one-third, of the approximately 20,800 claims that went to hearing were allowed.

[8] Data are not ordinarily compiled with respect to the outcome of cases in which consultant examinations are obtained (320,164 such examinations were performed in fiscal 1968). For purposes of this brief, however, the Department of Health,

for a consultant physician, even if he were inclined to do so, to slant his report in any way.

The probative value of the written reports is as great as their reliability. The reports ordinarily reflect objective medical findings resulting from tests or laboratory procedures. In this case, for example, Dr. Mattson's report (App. 193–194) describes and reflects the findings of the electromyographic study he conducted. That study consists of an examination, similar to an electrocardiograph examination, in which electrodes are wired to the subject's skin to pick up electrical impulses reflecting nerve and muscle potentials (see App. 136). The reports of Drs. Langston and Lampert (App. 175–177, 200–202) also reflect the results of tests which were a part of the physical examinations they performed. And the reports of the plaintiff's former treating physician, Dr. Munslow (App. 196–199, 205–209), reflect his observations as the person who had performed surgery on the claimant (see App. 165). His opportunity to examine the claimant's pathology visually during the surgery makes his reports perhaps the most probative evidence—written or oral—in the case.

In addition to relating the results of tests which were performed, written medical reports often include the opinions and conclusions of the examining physician based on the findings made during the course

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Education, and Welfare analyzed a 10-percent sample of the 86,260 cases involving one or more consultant examinations of the claimant in which there was a pre-hearing administrative determination in the first six months of calendar 1969. That survey showed that benefits were awarded in 52.4 percent (4,522 out of 8,626) of the cases.

of the examination. Such opinions and conclusions can, in a proper case, appropriately be subjected to scrutiny, through cross-examination of the author of the report or other expert testimony, to ascertain whether they were consistent with and justified by the findings made during the examination.[9] But, in the absence of a plausible claim that such opinions and conclusions are insufficiently supported or may otherwise be questionable, their strong probative value should be recognized.

In the present case, counsel did not request the issuance of subpoenas for the authors of any of the reports, even though subpoenas may be issued upon request, pursuant to 20 C.F.R. 404.926 (*infra*, pp. 43–44), when "reasonably necessary for the full presentation of a case * * *."[10] Nor did counsel suggest any reason during the two hearings why any physician

[9] The opinion expressed by the consultant Dr. Langston that the claimant was "obviously holding back and limiting all of his motions, intentionally" and that he thus had "a tremendous psychological overlay to this illness" (App. 175, 177), was borne out by the findings in the electromyographic study that the "motor units fired very slowly" thus "strongly suggest[ing] lack of maximal effect" (App. 193) (see 3–4, 5–6, *supra*).

[10] The procedure outlined by that regulation for obtaining a subpoena for a witness involves filing, not less than five days prior to hearing, a written request stating "the pertinent facts which the party expects to establish by such witness * * * and whether such facts could be established by other evidence without the use of a subpoena." The court below indicated some difficulty with the five-day requirement on the ground that "a claimant might not know at that time what witnesses he would need to subpoena in order to cross-examine the authors of hearsay evidence to be introduced by the Secretary," but observed that such a person could ask for a post-

should be called upon to give oral testimony explaining his report.[11] The court of appeals ruled that these circumstances precluded the claimant from "later complain[ing] of the fact that he has been denied the right of confrontation of adverse witnesses and the right of cross-examination" (App. 44; cf. *California* v. *Green*, No. 387, O.T., 1969, decided June 23, 1970), but refused to recognize that they also tend to corroborate the inherent reliability and probative value of the reports.

The courts of appeals have, in similar circumstances, recognized the reliability and probative value of written medical reports. At issue in *Long* v. *United States*, 59 F. 2d 602 (C.A. 4), was the admissibility in evidence, at the judicial trial of a veteran's claim on his war risk insurance policy, of the written reports of government physicians who examined him in connection with his claim for disability compensation.

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ponement or a supplemental hearing and that, indeed, the claimant here had the opportunity (which he did not utilize) after the first hearing to request subpoenas for the supplemental hearing (App. 43–44). The five-day requirement is reasonable since, as previously noted, the notice setting the hearing advises the claimant that the documentary evidence may be examined prior to hearing (App. 62; see p. 6, *supra*).

In our view, a claimant would not satisfy the requirements for the issuance of a subpoena merely by stating generally that he wished to cross-examine the authors of all written medical reports. See *Ingram* v. *Gardner*, 295 F. Supp. 380 (N.D. Miss.), appeal pending (C.A. 5, No. 27744).

[11] Claimant's counsel made no claim during the administrative hearing that his failure to request subpoenas or demonstrate the need for oral testimony of the authors of the reports resulted from insufficient time to prepare for the case or to examine the written medical reports.

In writing for the court, Judge Parker explained, citing 2 *Wigmore on Evidence* § 1420 *et. seq.*, and 3 *Wigmore* §§ 1630–1636, that exceptions to the rule precluding the admissibility of hearsay were based on principles of necessity and circumstantial guaranty of trustworthiness. The opinion then stated (59 F. 2d at 603–604), in language equally appropriate here, that such a report is trustworthy because

> it is made by an official of the government in the regular course of duty, who presumably has no motive to state anything but the truth, and it is made to be acted upon, and is acted upon, in matters of importance by officials of the government in the discharge of their duties. It is made, moreover, as a professional matter by a member of a learned and honorable profession in whom the sense of professional pride, as well as the sense of official duty, is conducive to truth and accuracy. While the diagnosis must necessarily rest partly upon statements made by the person examined as well as upon the observations of the examining physician, we think that such diagnosis in a report should be admitted on the same principle that would apply if the physician were testifying. The diagnosis is the opinion of a scientific expert who has examined the insured, heard his statements, and observed his symptoms. It approximates a statement of fact, being in reality what the physician observes when he views the insured with the trained eye of an expert. It gives meaning, moreover, to the statements as to physical facts observed, and serves as a check upon these statements,

precluding the drawing of inferences therefrom which the physician did not intend.

* * * * *

It is objected that the reports are not made under oath, and that there is no opportunity afforded for cross-examining the physicians when the reports are received. As to the first point, what we have said about the circumstantial guaranty of the trustworthiness is a sufficient answer. As to the second, it has no more force here than when asserted against the admission of any record entry. It is true that the diagnosis is an expert opinion, and thus differs from most entries as to facts; but, as stated above, such diagnosis approximates a statement of fact, and the report contains the facts and observations upon which the opinion is based, and thus furnishes the means by which the validity of same may be gauged, or by which it may be attacked if thought to be unsound.

The Court of Appeals for the Second Circuit has similarly upheld the admissibility under the Business Records Act, 28 U.S.C. 1732, of a written report of a doctor who had examined an injured plaintiff at the request of the defendant's insurer. The court reasoned that the report, which was offered by the plaintiff, "bears its own inherent guaranty of being what it purports to be—a detailed report of what [the specialist] found medically upon examining the subject." *White* v. *Zutell*, 263 F. 2d 613, 615.

To these judicial testimonials to the trustworthiness

of written medical reports,[13] we need add only that the reliability and probative value of such reports have, until the decision below, been implicitly recognized by the courts over the years in social security disability cases. The courts of appeals have routinely reviewed, and in many instances upheld, determinations of the Secretary in which the only supporting evidence has been in the form of written medical reports (or such reports plus the testimony of a medical advisor). See, *e.g., Ber* v. *Celebrezze,* 332 F. 2d 293, 296 (C.A. 2); *Stancavage* v. *Celebrezze,* 323 F. 2d 373, 374 (C.A. 3); *Dupkunis* v. *Celebrezze,* 323 F. 2d 380, 382 (C.A. 3); *Cochran* v. *Celebrezze,* 325 F. 2d 137, 138 (C.A. 4); *Cuthrell* v. *Celebrezze,* 330 F. 2d 48, 50–51 (C.A. 4); *Aldridge* v. *Celebrezze,* 339 F. 2d 190, 191 (C.A. 5); *Dodsworth* v. *Celebrezze,* 349 F. 2d 312, 313–314 (C.A. 5); *Bridges* v. *Gardner,* 368 F. 2d 86, 89 (C.A. 5); *Green* v. *Gardner,* 391 F. 2d 606 (C.A. 5); *Martin* v. *Finch,* 415 F. 2d 793, 794 (C.A. 5) (post-*Perales;* the court of appeals, in discussing the written medical reports, quoted the district court's reference to the "competent doctors" who filed reports and to the fact that "[o]ne of these doctors, Dr. Enger, a highly qualified orthopedic surgeon, had treated the plaintiff for one of the conditions on which he relied to establish disability. Surely his diagnosis is entitled

[13] We did not claim below, and do not claim here, that the reports in issue, most of which were prepared specifically for purposes of the administrative proceedings, would ordinarily be admissible in evidence in a judicial proceeding, under either the common law or the Business Records Act, 28 U.S.C. 1732. We rely on the foregoing decisions only to indicate that the courts have considered similar reports to be of great worth.

to great weight'');[13] *Breaux* v. *Finch*, 421 F. 2d 687, 689 (C.A. 5) (post-*Perales*); *Phillips* v. *Celebreeze*, 330 F. 2d 687, 689 (C.A. 6); *Justice* v. *Gardner*, 360 F. 2d 998, 1000–1001 (C.A. 6); *Moon* v. *Celebrezze*, 340 F. 2d 926, 928 (C.A. 7); *Pierce* v. *Gardner*, 388 F. 2d 846, 847 (C.A. 7), certiorari denied, 393 U.S. 885; *Celebrezze* v. *Sutton*, 338 F. 2d 417, 419–420 (C.A. 8); *Brasher* v. *Celebrezze*, 340 F. 2d 413, 414 (C.A. 8); *McMullen* v. *Celebrezze*, 335 F. 2d 811, 815 (C.A. 9), certiorari denied, 382 U.S. 854; *Flake* v. *Gardner*, 399 F. 2d 532, 534 (C.A. 9); *Celebrezze* v. *Warren*; 339 F. 2d 833, 836 (C.A. 10); *McMillin* v. *Gardner*, 384 F. 2d 596, 597 (C.A. 10).[14] Even though these courts did not expressly consider the issue presented here, this traditional acceptance of written medical reports in countless disability cases[15] is in itself persuasive testimony as to their reliability and probative value.

Indeed, the holding of the court below implicitly recognizes the substantial reliability and probative valve of written medical reports. The court not only ruled that such reports are properly admissible in

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[13] Compare Dr. Munslow's treatment of Perales, *supra*, pp. 2–3.

[14] As the court below observed, however, courts have, on occasion, criticized the use of written reports. See, *e.g.*, *Ratliff* v. *Celebrezze*, 338 F. 2d 978, 982 (C.A. 6); but see *Miracle* v. *Celebrezze*, 351 F. 2d 361, 365, 382–383 (C.A. 6).

[15] The cases cited are not exhaustive of those in which it is apparent from the appellate opinion that no oral testimony of an examining physician supported the Secretary's determination. Of course, many appellate opinions, perhaps significantly, do not specify whether the medical evidence was in oral or written form.

disability hearings (App. 40–45), but, in its opinion on rehearing, held in effect that such reports can constitute substantial evidence sufficient to support an administrative determination as to disability—so long as the claimant does not object to their admission and the reports are not "directly contradicted" by medical testimony (App. 55). But the mere presence of these factors does not in itself warrant the automatic result ordained by the court of appeals—that the reports, although still properly admissible, cannot be relied upon by the fact finder.

The noting of a general objection to admissible reports, without presentation of any reason why cross-examination of their authors is necessary, cannot rationally be viewed as depriving the reports of their otherwise recognized probative value. Nor does the mere presence of testimonial evidence "directly contradicting" the reports call for their blanket rejection. No one would be expected, in his personal activities or in his business or professional dealings, invariably to accept the testimonial views of one doctor over the written views of others—regardless of their respective qualifications and of the nature of the tests or examinations each of them performed. That is the common sense of the matter. And, so long as the "contradicted" reports were properly before the hearing examiner (as the court below correctly held was the case here), it is his function to resolve conflicts in the evidence and he should not be required to depart from common sense in doing so. In the present case, it was entirely reasonable for the hearing examiner to rely on the reports at issue, which were not themselves specif-

ically contradicted and which reflected scientific tests performed by highly qualified consultant physicians and surgical procedures performed by a former treating physician.[16]

B. EVIDENCE WHICH OTHERWISE MEETS THE REQUIREMENTS FOR SUBSTANTIALITY SHOULD NOT BE REJECTED MERELY BECAUSE IT IS "UNCORROBORATED HEARSAY"

Under the rationale of the court of appeals, the factors that would ordinarily indicate to physicians or others whether particular written medical reports should be considered reliable and probative—their content and authorship and the circumstances in which they were written—are all irrelevant. The

[16] The Department of Health, Education and Welfare informs us that it is commonplace in the medical profession for a treating physician to utilize consultant examinations by other physicians, usually specialists, in the treatment of a patient, and that written medical reports of such consultations are widely relied upon. For example, a survey in November 1964 of physicians (770 of whom responded) who had referred patients to the University of Washington Hospital for examinations indicated that more than 80 percent of the referring physicians who expressed an opinion regarded the reports they had received as "always" or "usually" adequate and prompt. Moreover, 50 percent of the referring physicians stated that they desired "letter only" communications from the consultant physicians, with the remainder either advocating telephone communication in addition to the letter or stating that the mode of communication depended on the circumstances. See The Consultant's Report—A Study of Opinions Expressed by Referring Physicians, 65 Northwest Medicine 739 (September 1966). See, also, The Consultant's Letter—Progress Report, 68 Northwest Medicine 138 (February 1969). It is, of course, appropriate for the hearing examiner to accord such reports "the probative force they would have in the conduct of affairs outside a courtroom" (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 497).

court's decision is, instead, based entirely on a technical—indeed, legalistic—characterization of the reports as "uncorroborated hearsay" (see App. 46–53). This is, of course, a rationale which tends to prove too much in comparison with the court's limited holding (see *supra,* pp. 10, 25–26), since it suggests that, in the absence of corroborating testimony, such reports, whether or not "contradicted," could never support an administrative determination. It is, however, the only theory articulated in the court of appeals' opinions, and we therefore turn to a brief discussion of it.

The court of appeals based its rationale upon the statement in *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence."' 305 U.S. at 230. That statement must, of course, derive its meaning from the context in which it was made, for, read more broadly, it would have been inconsistent with the remainder of the opinion, which emphasized the probative force, rather than the technical characterization, of the evidence. Indeed, at the beginning of the paragraph in which the quoted statement appears, the Court noted that it was there responding to the contention that the agency had relied on "remote hearsay" and "mere rumor." 305 U.S. at 229. More specifically, the contention was that (Brief for Petitioners, No. 19, O.T. 1938, p. 89):

> * * * prejudicial hearsay three or more degrees removed and mere rumor were freely received. To illustrate: A member and paid organizer of the [Union] (Mr. Kennedy) would testify that

> another member and organizer of [the Union] (Mr. Young) told him on the telephone ("either in the latter part of 1934 or the first part of 1935") something which some other person told Young that such other person thought.

The Court's statement in this setting that "mere uncorroborated hearsay or rumor does not constitute substantial evidence" should not, we submit, be regarded as a blanket rejection of administrative reliance on anything that can technically be deemed "uncorroborated hearsay," regardless of the inherent value and reliability of the particular evidence involved. Indeed, other courts of appeals and leading commentators have concluded, in contrast to the court below, that this Court's opinions do not, and should not, require reviewing courts to set aside administrative findings merely because they are not supported by at least a "residuum" of legally admissible evidence.

As the Court of Appeals for the Second Circuit has explained, evidence, even though "objectionable in a court of law," can support an administrative finding "if it is of a kind on which fair-minded men are accustomed to rely in serious matters." *Ellers* v. *Railroad Retirement Board,* 132 F. 2d 636, 639.[17] Accord,

[17] And in an opinion rendered prior to this Court's decision in *Consolidated Edison*, Judge Learned Hand expressed the view that "no doubt, * * * mere rumor will [not] serve to 'support' a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs". *National Labor Relations Board* v. *Remington Rand*, 94 F. 2d 862, 873 (C.A. 2), certiorari denied, 304 U.S. 576 and 585.

Marmon v. *Railroad Retirement Board,* 218 F. 2d 716, 717 (C.A. 3). See, also, *International Ass'n of Machinists* v. *National Labor Relations Board,* 110 F. 2d 29, 35 (C.A.D.C.), affirmed, 311 U.S. 72, explaining that "it is only convincing, not lawyers' evidence which is required" under the substantial evidence test; that the evidence "must be such as a reasonable mind might accept"; and that the courts "cannot reweigh the evidence in scales which a trial court would use in deciding whether to admit it" but are required to sustain administrative findings "if reasonable minds, unhampered by preconceptions derived from the technical law of evidence, might differ as to conclusions to be drawn from the evidence presented."

Professor Wigmore states flatly that the so-called "residuum rule" (applied here by the court of appeals) "is not acceptable," because it rests on the fallacy that "this 'residuum of legal evidence,' which is to be indispensable, will have some necessary relation to the truth of the finding." 1 *Wigmore on Evidence* (3d ed.), § 4b, pp. 40–41. But, concludes Wigmore (*id.,* pp. 41–42), since "the 'legal' rules have no such necessary relation," the residuum rule, which "rests on the assumption that the 'legal' evidence is *always* credible and sufficient, while the 'illegal' evidence is *never* credible nor sufficient," is "decidedly not the wise and satisfactory rule for general adoption."

Similarly, Professor Davis explains (2 *Administrative Law Treatise,* § 14.10, p. 292):

> * * * Even though the jury-trial rules of evidence have been tailored to the peculiar needs of juries, the residuum rule requires the use of

> those rules in cases in which no jury sits. And even though the jury-trial rules have been designed to guide admission or exclusion of evidence, not evaluation of evidence, the residuum rule requires use of those rules for evaluation of evidence. Under the residuum rule a finding which is unsupported by evidence which would be admissible in a jury trial must be set aside, *no matter how reliable the evidence may appear to the agency and to the reviewing court,* no matter what the circumstantial setting may be, no matter what may be the evidence or lack of evidence on the other side, and no matter what may be the consequences of refusing to rely upon the evidence [emphasis added].

Professor Davis goes on to state that, once the residuum rule and its alternative are understood, "the reasons against the rule become overwhelming." *Id.* at 293. He specifies, as the strongest such reason, the "lack of correlation between reliability of evidence and the exclusionary rules of evidence." [13] *Id.* at 295. Thus, he states (*ibid.*):

> * * * the residuum rule falsely assumes the utter worthlessness of all evidence that would be excluded in a jury trial. Those who reject the the residuum rule would permit the agency and the reviewing court to exercise a discretionary power to determine where the particular evi-

[13] Another reason given by Professor Davis is that, even in jury trials, "incompetent" evidence which is admitted without objection may be given "its natural probative effect" (*Diaz* v. *United States*, 223 U.S. 442, 450; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 155), while the residuum rule prevents the agency and the reviewing court from giving like effect to evidence which has been properly admitted.

> dence falls in the scale from the highest reliability to utter worthlessness. * * * [19]

A leading commentator on workmen's compensation law similarly states that the assumptions upon which the residuum rule is based are "contradicted by common experience," in that "all kinds of deceptive evidence gets into trials operated under the strictest evidence rules, while, on the other hand, some evidence is barred upon which any prudent man would readily base an important judgment affecting his private affairs." 2 Larson, *Workmen's Compensation,* § 79.23, pp. 292–293.

Whatever may be said of the validity of the residuum rule generally, its application here is particularly inappropriate, in light of the flexible procedures Congress established for administrative determination of disability claims under the Social Security Act, including the statutory authorization of hearsay evidence (see *supra,* pp. 14–16), and the great reliability and probative value of the type of documentary "hearsay" utilized in such cases (see *supra,* pp. 17–27). Moreover, necessity—because of the relative unavailability of other evidence concerning the issue involved—is relevant in determining the substantiality of evidence in administrative proceedings, just as it is relevant to the question of admissibility of evidence in judicial pro-

[19] As Professor Davis has stated elsewhere, "the reliability of hearsay ranges from the least to the most reliable. The reliability of non-hearsay also ranges from the least to the most reliable." 32 Geo. Wash. L. Rev. 689. See, also, McCormick, *Handbook of the Law of Evidence.* p. 627, explaining that "the trustworthiness of hearsay ranges from the highest reliability to utter worthlessness."

eedings. For example, Judge Parker's explanation of the necessity for the admission of the written medical reports involved in *Long* v. *United States, supra,* is equally pertinent here (59 F. 2d at 603–604):

> * * * these reports of examining physicians are made ordinarily by physicians of the Veterans' Bureau who are either not available as witnesses or whose testimony, if they are available, can be secured only at great trouble and expense. Moreover, their testimony when produced is ordinarily a mere recital of what is contained in their reports, to which they must look for the purpose of refreshing the memory; and every one with experience in conducting litigation knows that as a matter of fact such reports are more reliable than the memory of the witnesses who made them, and that, if a witness without giving good reason therefor should contradict the statements contained in the reports, the reports would be accepted by any trier of facts in preference to the oral testimony. The examining physicians of the government examine hundreds of disabled soldiers. The written record of an examination made at the time is undoubtedly more trustworthy than the treacherous memory of a busy man dealing with many cases having many points of similarity. It is clear, therefore, not only that it is necessary as a practical matter that these reports be received if evidence is to be had of the matters to which they relate, but also that they are more dependable than would be the oral testimony of the witnesses who made them, and are, in reality, the best evidence obtainable as to such matters.

Similarly, in dealing with the admission of written reports before the Appeals Council, the court below, in an opinion by Judge Brown, stated, in words which are equally applicable to the proceedings at hearings, that a factor which the substantial evidence test "must necessarily take into account [is] the unusual nature of these administrative proceedings" and concluded that "the sheer magnitude of [the] administrative burden necessitates that ordinarily this * * * evidence be in the form of written reports with no means available for explanation, testing, or elaboration through the traditional facility of oral testimony." *Page* v. *Celebrezze,* 311 F. 2d 757, 760 (C.A. 5).

The "magnitude of the administrative burden" is indicated by the fact that some 23,000 hearings on disability claims are held annually.[20] Under the holding below, the oral testimony of the reporting physicians would be required in a large category of these cases without any showing of need. This requirement poses a threat of serious, and we believe unwarranted, impairment of the administration of the

[20] At an estimated $100 per hearing, the cost of testimony by a consultant physician at each such hearing would be over $2 million per year. The expense would be borne by the trust fund, which Congress has shown concern to protect from the drain of "unwarranted costs." See H. Rep. No. 2936, 84th Cong., 2d Sess., p. 26. The far more serious loss to the Nation, as developed below, would be the loss of the time of highly skilled physicians whose time and effort would be diverted to transporting themselves to, waiting for, and participating in such hearings.

Social Security disability provisions—and, by analogy, of other governmental programs as well.[21]

Under the present practice, consultant physicians are required to testify only in the relatively few cases in which a specific need for their testimony, sufficient to obtain a subpoena, has been shown. Requiring their oral testimony in the far larger category of cases in which the decision below would require it would result in a serious, unnecessary drain on the productive time of practicing physicians, which is already in critically short supply.[22]

This prospect would threaten to disrupt the administration of the entire program by discouraging physicians from conducting the consultant examinations. Indeed, in a statement filed in the court of appeals in connection with the petition for rehearing, the Commissioner of Social Security asserted that, based on his experience, on the views of his Medical Advisory Committee (a body of physicians which consults with and advises him concerning the operation of the disability program), and on the views of State agency directors concerning the attitudes of local physicians, fear that they would be required unnecessarily to

[21] A summary of the present use of written medical reports in administrative proceedings in several other government agencies is set forth in Appendix C, *infra*, pp. 49–50.

[22] An article prepared for the New York Times Annual Education Review by Roger O. Egeberg, HEW's Assistant Secretary for Health and Scientific Affairs, notes that doctors are working an average of 60 hours a week, "are finding it increasingly hard to expand their productivity" and "have little time for preventive care," and concludes that "[m]ore doctors are urgently needed. It has been estimated that we need 50,000 doctors to meet present demand * * *." New York Times, January 12, 1970, p. 74, col. 2.

testify at hearings would make physicians "refuse to conduct the consultative examinations."

This result is of concern not only to the Secretary but to claimants, for reports from the consultants often furnish the basis for the allowance of a claim prior to hearing (see p. 18, *supra*). Perhaps, as the court below said, possibly somewhat cavalierly, "[i]f a doctor refuses to serve, another can be obtained" (App. 56). But that risk should not needlessly be imposed on those dependent upon this program.

III

THE SECRETARY ALSO PROPERLY RELIED ON THE ORAL TESTIMONY OF A MEDICAL ADVISOR

In holding that written medical reports, objected to and directly contradicted by expert testimony, cannot constitute substantial evidence to support the denial of a disability claim, the court below also rejected the oral testimony of the medical advisor on the ground that it was "hearsay on hearsay" and could not "corroborate" the "hearsay" reports (App. 49). If the court had been correct in its premise that testimonial corroboration of the reports is needed, we might agree with its conclusion that the medical advisor's testimony, which is based on the medical evidence in the case and not on personal examination of the claimant, could not furnish such corroboration. As we have shown in Point II, *supra*, however, corroboration should not be required to warrant reliance upon written medical reports.

Both courts below, however, also specifically criticized the use of medical advisors. Consequently, al-

though this criticism does not relate to the central issue in this case (*i.e.*, the substantiality of written medical reports), we believe it appropriate to discuss the role of the medical advisor.

The district court rejected the testimony of the medical advisor on the grounds that he had not personally examined the claimant and did not testify in response to hypothetical questions (App. 31–32). The court of appeals stated that "[i]t appears * * * that there is a widespread practice by hearing examiners of having testifying doctors accompany them, and, in a manner of speaking, 'ride the circuit' with them, for the purpose of examining medical records and reports of claimants and then testifying as experts, with or without a cursory examination of the claimants, as to their disability. This procedure should be frowned upon, if not eliminated altogether" (App. 51–52). Such criticism is, we submit, unwarranted.

Responsibility for the conduct of hearings is vested in the Bureau of Hearings and Appeals of the Social Security Administration, which maintains a list of physicians (different from the panel of physicians who have agreed with the State agencies to conduct consultant examinations) who have agreed to serve as medical advisors when needed.[23] The Bureau informs us that since 1961 it has required that each such phy-

[23] The Department of Health, Education and Welfare informs us that medical advisors testified at 13.8% of the hearings on disability claims held in fiscal 1967. Corresponding figures were 12.0% in fiscal year 1968, and 13.9% in fiscal 1969. In fiscal 1968, the only year for which more specific information was compiled, 512 different individuals testified as medical advisors at the 2,313 hearings at which medical advisors appeared.

sician "be a diplomate of the appropriate medical specialty board and/or hold a professorial appointment at a recognized medical school." The reason for the use of medical advisors is well stated in the Bureau's form letter for recruiting physicians to serve as medical advisors.[24] It is that

> hearing examiners, who are lawyers, have received from time to time enough medical indoctrination to be able to understand the basic significance and import of clinical findings. However, not being doctors, they are sometimes in need of expert medical advice from well qualified medical experts * * *. [O]ur hearing examiners will request the appearance of their medical experts only in cases of unusual complexity * * *. [At the hearing] the hearing examiner will simply ask the doctor for an explanation of medical problems in language understandable to a layman, and the doctor's expert advice will be sought from a strictly neutral standpoint.[25]

The medical advisor often furnishes two somewhat distinct types of testimony at hearings. His more limited function is that of simply explaining the nature, and the significance of the results, of clinical and laboratory tests reported by other doctors. For example, Dr. Leavitt, the medical advisor here, testified as to the nature of and technique involved in an electromyographic examination and explained the dif-

[24] For the Court's information, we have reproduced that letter as Appendix B, *infra*, pp. 45–48.

[25] At the outset of the testimony of the medical advisor in the present case, his completely independent role was again emphasized (App. 130–131).

ferent types of graph readings that might be obtained from such an examination and what their significance would be (App. 136–137).[26] He then explained the significance of the particular findings in the electromyographic examination of the claimant reported by Dr. Mattson (App. 137–138).

In addition to such limited explanatory testimony, medical advisors sometimes give their own opinion of the claimant's condition—based on all the medical evidence in the case, both documentary and testimonial.[27] As previously noted (*supra*, p. 8), Dr. Leavitt offered such an opinion in the present case.

Such use of expert testimony at these hearings is, we submit, entirely reasonable and helpful in achieving accurate determinations, and should not have been criticized by the courts below.[28] Both courts objected to the fact that the medical advisor had not examined the claimant. But the medical advisor's role at the hearing is that of an expert witness, and there is no requirement, even in a judicial proceeding, that an expert witness have personal knowledge of the facts upon which he bases his opinion. It is elementary that

[26] In addition to his oral explanation, the medical advisor prepared an illustrative sketch (see App. 136–137) which was admitted into evidence (App. 151) as Exhibit 27 (App. 203–204).

[27] As reflected in the recruitment letter (App. B, *infra*, p. 45), and in the testimony in this case (App. 131), the medical advisor does not examine the claimant prior to offering this opinion.

[28] The court of appeals' general reference to circuit-riding doctors (*supra*, p. 37) seems singularly inapplicable to a man of Dr. Leavitt's distinguished qualifications and demanding professional activities (see *supra*, p. 8, n. 6).

an expert witness is permitted to base his opinion either on facts which are within his own knowledge or on facts which are in evidence as a result of the personal knowledge of others and which he assumes to be true in offering his testimony even though he has no personal knowledge of their existence.[29] In cases such as this one, the assumed facts upon which the expert medical advisor bases his testimony consist of the entire record of medical evidence in the case. It is, of course, understood by everyone at the hearing that he has not examined the claimant and thus cannot personally vouch for the accuracy of the assumed facts.[30]

In contrast to the court below, the Court of Appeals for the Fourth Circuit has expressly recognized that

[29] Wigmore illustrates this principle by explaining that "a physician may examine a patient at his home and observe certain symptoms, whence he reaches the conclusion that a fever exists; but the same symptoms may be stated to him by counsel in court, and he may then reach the same conclusion, and it will be receivable, except that it will rest upon the hypothesis that the symptoms stated to him actually existed." 2 Wigmore, *Evidence*, § 652, p. 756. In other words, an expert witness' "opinion may be adequately obtained upon hypothetical data alone; and it is immaterial whether he has ever seen the person, place, or thing in question." *Id.*, § 677, p. 798.

[30] The requirement which the district court would impose—that the medical advisor testify only in response to hypothetical questions—is unnecessary in the context of these administrative proceedings. The purpose of the hypothetical question requirement is to insure that the fact-finder (typically a jury) understands the assumed factual basis upon which an expert's opinion is based so that when the fact-finder later determines the actual facts, the applicability of the opinion to, and its validity in light of, those facts can be determined. See 2 Wigmore, *Evidence*, § 672, pp. 792–793. In the informal administrative hearing, however, the medical advisor can make entirely clear to the hearing examiner which aspects of the medical evidence in the case form the basis for his testimony.

the failure of a medical advisor to examine a social security disability claimant "does not destroy the vitality of his opinion." *Laws* v. *Celebrezze,* 368 F. 2d 640, 644. See, also, *Levine* v. *Gardner,* 360 F. 2d 727, 729–730 (C.A. 2). But see *Mefford* v. *Gardner,* 383 F. 2d 748, 759–760 (C.A. 6).[21] And, in a similar situation, involving the determination of a pilot's eligibility for an airman's medical certificate, the Court of Appeals for the Eighth Circuit, in an opinion by Judge Blackmun, permitted the National Transportation Safety Board to accept, despite the contrary opinions of the applicant's expert witness and another expert witness called by the Board, both of whom had examined the applicant, the opinion of a medical expert who "had not personally interviewed the [applicant] * * * [but] had examined the records introduced at the hearing and had heard the medical testimony." *Doe* v. *Department of Transportation,* 412 F. 2d 674, 676–680. In so ruling, the court specifically rejected the contention that the expert's failure to "conduct a personal examination of the applicant" was significant. 412 F. 2d at 680.

We submit, in short, that medical advisors can and do perform an extremely useful and informative function in the adjudication of disability claims, and that it is entirely proper for a hearing examiner to elicit, and to rely upon, expert testimony from a qualified

[21] While, as noted by the court below (App. 50–51), the Fourth Circuit did say in *Hayes* v. *Gardner,* 376 F. 2d 517, 521, that "the opinion of a doctor who never examined or treated the claimant cannot serve as substantial evidence," the court in *Hayes* reached that result only "in view of the opinion evidence [of the treating physician] as to the existence of a disability, combined with the overwhelming medical facts [and] the uncontradicted subjective evidence." 376 F. 2d at 520–521.

medical advisor in those cases in which he believes such testimony to be needed.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded with instructions that the district court determine, under the proper standards, whether the Secretary's decision denying disability benefits was supported by substantial evidence.

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JULY 1970.

APPENDIX A

Statutes and Regulations Involved

1. The Social Security Act, as amended, 42 U.S.C. 401 *et seq.*, provides in pertinent part:

§ 405(a).

The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

§ 405(b). * * * Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

* * * * *

§ 405(g). * * * The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive * * *.

2. Title 20 of the Code of Federal Regulations provides in pertinent part:

§ 404.926 Subpoenas.

When reasonably necessary for the full presentation of a case, a hearing examiner or a member of the Appeals Council, may, either upon his own motion or upon the request of a party, issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents which are relevant and material to

any matter in issue at the hearing. Parties who desire the issuance of a subpoena shall, not less than 5 days prior to the time fixed for the hearing, file with the hearing examiner or at a district office of the Administration a written request therefor, designating the witnesses or documents to be produced, and describing the address or location thereof with sufficient particularity to permit such witnesses or documents to found. The request for a subpoena shall state the pertinent facts which the party expects to establish by such witness or document and whether such facts could be established by other evidence without the use of a subpoena. Subpeonas, as provided for above, shall be issued in the name of the Secretary of Health, Education, and Welfare, and the Social Security Administration shall pay the cost of the issuance and the fees and mileage of any witness so subpoenaed, as provided in section 205 (d) of the act.

§ 404.927 Conduct of hearing.

Hearings shall be open to the parties and to such other persons as the hearing examiner deems necessary and proper. The hearing examiner shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the hearing examiner believes that there is relevant and material evidence available which has not been presented at the hearing, the hearing examiner may adjourn the hearing or, at any time prior to the mailing of notice of the decision, reopen the hearing for the receipt of such evidence. The order in which evidence and allegations shall be presented and the procedure at the hearing generally, except as these regulations otherwise expressly provide, shall be in the discretion of the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

APPENDIX B

Letter to Prospective Medical Advisors

Department of Health,
Education, and Welfare,
Social Security Administration,
Washington, D.C.

The Bureau of Hearings and Appeals of the Social Security Administration, which is responsible for hearings and final action on disability claims under the Social Security program, has for the past several years been engaged in procuring the services of medical experts as advisors to its hearing examiners throughout the country.

While we do not have a hearing examiner office in your city, our hearing examiners sometimes hold hearings there, so we are anxious to obtain the best qualified medical experts in the area to whom they may turn for advice on medical problems. It is for this reason that I am writing to you at this time.

Our hearing examiners, who are lawyers, have received from time to time enough medical indoctrination to be able to understand the basic significance and import of clinical findings. However, not being doctors, they are sometimes in need of expert medical advice from well qualified medical experts such as you.

I would like to assure you at the start that the duties of medical advisor will not entail too much of the time of any one doctor. They consist in the perusal of clinical and other medical records and advising the hearing examiners prior to, during, or after hearings. No personal medical examination of any claimant by the medical advisor is ever involved.

Originally, our hearing examiners addressed all questions on medical problems to their medical advisors in writing and the doctors would reply in writing. More recently we have inaugurated a policy of having our medical advisors appear as expert witnesses at the actual hearings. Both the hearing examiners and the doctors who have participated in this new procedure have been most enthusiastic about it and about its advantages over the written question-and-answer method. However, we will continue to use written interrogatories in appropriate cases.

Under the oral method of obtaining medical advice our hearing examiners will request the appearance of their medical experts only in cases of unusual complexity and any such personal appearance will be scrupulously scheduled at a time that will be most convenient to the doctor concerned and only if he is willing to appear. While all the testimony is under oath, the proceedings are rather informal, the strict rules of evidence are not followed, and it is not at all like a formal court trial. The hearing examiner will simply ask the doctor for an explanation of medical problems in language understandable to a layman, and the doctor's expert advice will be sought from a strictly neutral standpoint. (Incidentally, the time required for the testimony of the medical experts who have been used in the cases we have had thus far has averaged not more than one hour.)

We do not anticipate that any one doctor will be called upon for his services so often that he will find it onerous, since we hope to obtain enough doctors in each city in each of the major specialties to establish a rotating system with no one doctor unduly burdened. No one doctor will be used more than a few times a year, and, in any event, if for any reason whatsoever, any doctor does not wish to participate in

a particular case, either by answering questions in writing or by appearing at a hearing, he has only to tell the hearing examiner of his decision.

At the present time our contracts with our medical advisors provide for remuneration at the rate of $50 per case for a written comment in reply to questions asked in writing by a hearing examiner, with additional fees for subsequent written comment on the same case. The fee for personal appearance as an expert witness at a hearing is $75 per appearance on any day or fraction of a day in any one case. (Under this fee schedule the doctor and the hearing examiner may find it practical and economically advantageous to the doctor to save up a number of cases and hold hearings on the same day. However, this would be a purely optional matter on the part of the doctor concerned.) Additional fees for prehearing examination and study of the records and for certain other circumstances are also provided for in our contract.

We are very proud of the outstanding doctors throughout the country who are already serving as our medical advisors. They include such notables as Dr. John J. Sampson of San Francisco, California, 1964 President of the American Heart Association; Dr. Charles K. Friedberg of New York, author of *Diseases of the Heart;* Dr. George E. Burch of New Orleans, editor of the *American Heart Journal;* Dr. Howard P. Lewis of Portland, Oregon, Past President of the American College of Physicians; Dr. George R. Meneely of Shreveport, Past President of the American College of Cardiology; Dr. Jack R. Ewalt of Harvard Medical School, President of the American Board of Psychiatry and Neurology; and Dr. Fred C. Reynolds, Professor of Orthopaedic Surgery, Washington University School of Medicine, and Past President of both the American Board of

Orthopaedic Surgery and the American Academy of Orthopaedic Surgery.

We hope that you too will be willing to join this distinguished group of doctors who now number over one thousand. I am taking the liberty of forwarding herewith a contract, which I hope you will sign and return to us in the enclosed self-addressed envelope. I am also enclosing one of our "Professional Qualification" forms, which you may use for your curriculum vitae, although any other form of curriculum vitae will be acceptable.

Looking forward to receiving your contract and to a long and rewarding association, I am

Sincerely yours,

HAROLD I. PASSES, M.D.,
Acting Chief Medical Officer.

P.S. If there are any questions which you would like to have answered prior to signing a contract with us I will be only too happy to answer them, either in writing or by personal call to you.

Enclosures 3.

APPENDIX C

Summary of the Use of Written Medical Reports in Some Other Federal Agencies

In fiscal 1969, the Veterans Administration, in considering 226,426 new claims for service and non-service connected disability benefits and reconsidering more than 4.5 million previous awards to ascertain whether disability continued to exist, obtained reports concerning 301,515 medical examinations performed by its staff and 43,893 medical examinations performed by consultant private physicians on a fee basis. The Board of Veterans Appeals, which is the final arbiter of these claims (see 38 U.S.C. 211(a), 4004), held almost 22,000 hearings in fiscal 1969. The authors of the written medical reports upon which decision is based do not testify at the hearings.

Similarly, the Railroad Retirement Board has informed us that it yearly determines between 9,000 and 10,000 claims for disability benefits, and that consultant examinations are required in approximately one-half to two-thirds of those cases. In the past several years, there have been no instances in which the consultant physicians have testified in the few cases which reach the administrative hearing stage.

The Federal Aviation Administration receives almost 500,000 applications per year from individuals seeking the medical certificate necessary to obtain an airman's certificate. 49 U.S.C. 1422. Any such applicant is referred for a medical examination to an "aviation medical examiner," *i.e.*, a physician in the applicant's community designated by the Administrator to perform such examination (see 14 C.F.R. 67.23).

Appeals within the FAA are determined on written medical records alone. The appeals of those individuals whose applications are denied by the FAA are determined by the National Transportation Safety Board, which is not bound by the FAA's factual findings (49 U.S.C. 1422, 1655). We are advised that, in order to present most effectively to the Board the evidence supporting its determination not to issue a medical certificate, the FAA makes it a practice to call physicians for live testimony in those few cases (an average of approximately 70 per year) in which appeals to the Board are taken and hearings held.

One agency has found it appropriate to follow a practice similar to that prescribed in the decision below, with respect to a program which involves relatively few hearings. The Department of Labor's deputy commissioners held 355 hearings in fiscal 1969 in adjudicating claims for disability benefits under the Longshoremen's and Harbor Workers' Compensation Act and its several extensions to other types of employees (see 33 U.S.C. 901 *et seq.;* 42 U.S.C. 1651; 5 U.S.C. 8171; 36 D.C. Code 501). The deputy commissioners are authorized to obtain consultant medical examinations of claimants but, since the hearings generally involve competing presentations by the claimant and by his employer (or its insurer), we are advised that the deputy commissioners ordinarily do not rely on written medical reports in those cases in which one of the adverse parties objects (see *Southern Stevedoring Co.* v. *Voris,* 190 F. 2d 275 (C.A. 5)).

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